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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 252.

J. D. JOHNSON,
Petitioner,

vs.

BRUCE GRAHAM, Trustee of Greene County, Tennessee; GREENE COUNTY, TENNESSEE, et al.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee.

BRIEF FOR RESPONDENTS.

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December 7, 1946.

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SUPREME COURT OF THE UNITED STATES.

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J. D. JOHNSON,
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BRUCE GRAHAM, Trustee of Greene County, Tennessee; GREENE COUNTY, TENNESSEE, et al.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee.

BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

Petitioner, as a resident of Greene County, Tennessee,[1] was there assessed for 1944 state and county poll tax in the amount of $2.00.[2] He paid this tax assessment together with a one cent penalty on March 9, 1945, under protest.[3] Thereupon he filed a statutory action[4] in debt in a justice of the peace court to recover the protested tax payment and was awarded judgment.[5]

1 R. 17.

2 R. 28.

3 R. 19; Ex. I, R. 37-8.

4 2 Williams' Code of Tennessee, Secs. 1790-9.

5 R. 1-2.

Upon appeal to the circuit court petitioner's suit was dismissed after a trial de novo.[6] Likewise the Tennessee Supreme Court denied recovery, affirming the judgment of the circuit court in a per curiam opinion filed March 2, 1946.[7]

On July 1, 1946 the petition for certiorari and transcript of the record were filed in this Court.

PETITIONER'S FALLACIOUS PREMISE.

Throughout the litigation petitioner has based his case upon the premise that the state statute which levies the Tennessee poll tax (2 Williams' Tenn. Code, Sec. 1082) has been repealed **despite the fact that the repealing statute** (Tenn. Pub. A. 1943, Chap. 37) **upon which petitioner relies has been declared void by the Tennessee Supreme Court because of unconstitutionality under the Tennessee Constitution.**[8] Petitioner's insistence seems to be that by declaring the repealing act unconstitutional the Tennessee Supreme Court has **levied** the tax and thereby invaded the exclusive province of the legislature, contrary to those portions of the United States Constitution which guarantee to the states a republican form of government (U. S. Const., Art. IV, sec. 4) and protect against state laws which abridge privileges and immunities, deprive of property without due process of law, and deny equal protection of the law (U. S. Const., Amend. XIV, sec. 1). Petitioner also mentions Article I, sec. 2.

---

6 R. 11-12, 15-39.

7 Johnson v. Graham et al., 183 Tenn. ..., 192 S. W. (2d) 832. A copy of this opinion appears in this brief at p. 15.

8 Biggs v. Beeler (1943), 180 Tenn. 198, 173 S. W. (2d) 144, 946, 153 A. L. R. 510. Copy of the opinion in the Biggs case appears at p. 20 in this brief.

OPINION OF THE COURT BELOW.

The opinion of the Tennessee Supreme Court (R. 41-44) is copied in this brief at p. 15.[9]

[The opinion below in this case is rested upon precedent set in the case of Biggs v. Beeler (1943), 180 Tenn. 198, 173 S. W. (2d) 144, 946, 153 A. L. R. 510. By collateral attack petitioner insists that the decision in the Biggs case is contrary to the United States Constitution. For the convenience of the Court a copy of the Biggs case opinion appears in this brief at p. 20.]

QUESTIONS AT ISSUE.

1. Is there any substantial federal question which compels exercise of jurisdiction under Judicial Code Sec. 237 as amended (28 U. S. C. A. 344[b]).

2. Is the levy and collection of a capitation or poll tax as a state revenue measure prohibited by the United States Constitution provisions cited by petitioner (Art. 1, sec. 2, Art. IV, sec. 4, Amend. XIV, sec. 1).

3. Collaterally, do the provisions of the United States Constitution which petitioner cites prohibit a state court from adjudging a state statute, wherein the repeal of a revenue statute is undertaken, void as being contrary to the State Constitution (the Biggs case).

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9 Also see 183 Tenn. ...., 192 S. W. (2d) 832.

SUMMARY OF ARGUMENT.

I. There is no substantial federal question presented in this case which compels with exercise of jurisdiction under Judicial Code Sec. 237 (b).

II. The collection of a capitation or poll tax is not prohibited by the United States Constitution provisions relied upon by the petitioner; and the poll tax here involved was legally levied, assessed and collected.

III. The United States Constitution provisions cited by petitioner do not prohibit state courts from declaring state statutes invalid because violative of State Consitution—specifically herein, the invalidation of a legislative act which attempts the repeal of a section of the state revenue law.

IV. The Tennessee poll tax is not a tax levied upon voters.

ARGUMENT.

I. There is no substantial federal question presented in this case which compels with exercise of jurisdiction under Judicial Code Sec. 237 (b).

A. The question decided in the court below was non-federal, namely, whether that court, recognizing stare decisis, would determine this case upon the precedent of an earlier case which had held valid the revenue act provision herein involved. As the court stated the question before it in its opinion:

> "Counsel for plaintiff [petitioner here] in summing up his position says that the only question before this Court is whether the lower Court was in error in recognizing as controlling and following the decision of this Court in Biggs v. Beeler, supra.[10]
>
> . . . . . .
>
> "It is to be borne in mind that it is liability for the payment of this tax under Code Sec. 1082 which alone is involved. **No question of the validity of the requirement** elsewhere provided by statement **of prepayment of the tax as a qualification for voting was before the trial Court and is properly before us.** . . The payment was, therefor, not exacted as a qualification for the exercise of plaintiff's right of franchise and was not made for the purpose of complying with this requirement" (Emphasis supplied).
>
> Johnson v. Graham, et al., R. 42, this brief p. 15, 192 S. W. (2d) 832.

B. The decision below having been reached on non-federal grounds and without evasion of issues involving the United States Constitution, this Court will not under-

10 180 Tenn. 198, 153 A. L. R. 510; also at p. 20, this brief.

take to determine the correctness of the state court decision.

Broad River Pwr. Co. v. South Carolina ex rel. Daniel, 281 U. S. 537, 540, 74 L. ed. 1023, 1030;
Brinkerhoff-Faris Trust and Sav. Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107;
Bacon & Sons v. Martin, 305 U. S. 380, 381, 83 L. ed. 233, 235.

C. Regardless of petitioner's aversions to the contrary,[11] the record is conclusive that **there is no question in this case involving suffrage as qualified by the poll tax.**

Plaintiff was not refused the right to vote because of failure to pay the tax in question here; nor did he rely at any time upon the payment of the poll tax here in question as a voting qualification in any election, nor intend to present his poll tax receipt to any election official as evidence of voting qualification.

1. In testifying petitioner stated:

"X. In other words, there wasn't any one you expected to vote for under the 1944 poll tax receipt?
"A. No, sir.
"X. There were no Federal candidates that you could vote for under that poll tax?
"A. No, sir" (R. 22).

2. Tennessee Code section 2027 provides in part:

"Every person . . . shall . . . furnish to the judges of election satisfactory evidence that he has paid the poll tax, if any, assessed against him **for the year next preceding the** election . . ." (Emphasis supplied.)

3. The poll tax here in question was the payment in March 1945 of the poll tax assessed against petitioner in

11 Petitioner's brief, p. 5, points II and III; pp. 6-7, 10-11, 12-14.

1944. There were no elections to be held in 1945 since that year was an "off" year in Tennessee,[12] and therefore petitioner's 1944 poll tax receipt could not be used as a qualification for voting in any election.

4. Consequently, the present cause is one solely concerned with the collection of state revenue and not one relating to "a tax upon petitioner's right to vote" (Petitioner's Brief, p. 5).

II. **The collection of a capitation or poll tax is not prohibited by the United States Constitution provisions relied upon by the petitioner; and the poll tax here involved was legally levied, assessed and collected.**

A. That the levy of poll taxes constitutes a valid exercise of taxing power has been recognized in this country since earliest days.

> "Capitation or poll taxes are generally regarded as a proper means for raising revenue for public purposes. The legislature of a state ordinarily has power to impose a poll tax, in the absence of direct constitutional prohibition or limitation, and constitutional objections have for the most part been overruled and the imposition of the tax held constitutional. In some states the constitution itself expressly authorizes or levies a poll tax; but constitutional provisions relating to capitation taxes are generally not self executing."
>
> 4 Cooley Taxation (4th ed.) 3499-3501.

> "Levy by the poll has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the colonies and later in the states."
>
> Breedlove v. Suttles (1937), 302 U. S. 277, 281, 82 L. ed. 252; 61 C. J. 1534, Pirtle v. Brown

12 3 Williams' Code of Tennessee, Secs. 1915, 1919, 2227.2.

(1941), 118 F. (2d) 218, 139 A. L. R. 557; cer. den. 314 U. S. 621, 86 L. ed. 499. (This case presents a most thorough consideration of the Tennessee poll tax.) Compare: Butler v. Perry, 240 U. S. 330, 331, 60 L. ed. 672, 673-4; U. S. Const., Art. I, sec. 9 (4).

B. Poll taxes have been levied in Tennessee since prior to the admission of the State to the Union (1796) having been effective under the laws of North Carolina, the mother state prior to the separation of Tennessee.

Citation of the early poll tax levies in Tennessee together with a full listing of cases sustaining the validity of various poll tax levies, including the present act, appears in the appendix of this brief at p. 19. The present levy of the poll tax in Tennessee is 2 Williams' Code (1934) Sec. 1082 (which appears in this brief at p. 15) and Sec. 1558.

C. **Even if** this case involved the validity of Tennessee Code Section 2027 (quoted supra, p. 6), wherein the right of suffrage is conditioned upon proof of payment of any poll tax assesed for the next preceding year, petitioner's contentions have been foreclosed.

1. "To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments, and other provisions of the Federal Constitution, the State may condition sufferage as it deems appropriate. . . . (Citing cases.)

. . . . . .

"The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in

many States and for more than a century in Georgia. That measure reasonably may be deemed essential to that form of levy. Imposition without enforcement would be futile.

> Breedlove v. Suttles, 302 U. S. 277, 283-4, 82 L. ed. 252, 256.

2. With the Tennessee Constitution and the Tennessee statutory provisions levying and providing for collection of the Tennessee poll tax directlv in issue, the Circuit Court of Appeals for the 6th Circuit held:

> "We think it reasonable to conclude that the provisions requiring the payment of a poll tax as a prerequisite to voting do not so much connote a levy and assessment as they do an effective method of collection. **They do not levy a poll tax on any voter.**" (Emphasis supplied.)
>
> Pirtle v. Brown (1941), 118 F. (2d) 218, 139 A. L. R. 557, 560, Cer. den. (1941), 314 U. S. 621, 86 L. ed. 499;
>
> See also extensive annotations, 139 A. L. R. 569 and 82 L. ed. 257.

D. Petitioner's attack upon the collection of his poll tax upon the ground that it has been collected from him in violation of U. S. Constitution Amend. XIV, sec. 1, is entirely without merit.

1. Poll taxes do not infringe the "privileges and immunities" clause.

> Breedlove v. Suttles, supra, 283 L. ed. 256;
> Pirtle v. Brown, supra, 559 and 561.

2. Poll taxes such as that involved herein do not infringe the "due process" clause.

a. The Tennessee Constitution provides for a mandatory self executing poll tax.[13]

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13 Tennessee Constitution, Art. II, Sec. 28; see this brief, pp. 18-19.

b. The Tennessee legislature has made the Constitution effective by a poll tax levy.[14]

c. The poll tax in question was assessed against petitioner in the county of his residence and was there payable to the county trustee (R. 28).

d. Notice of assessment was given petitioner both by publication (R. 31-2) and by a personal letter notice from the trustee (R. 34).

e. Petitioner is accorded a statutory right, which he has availed himself of herein, to pay his tax under protest and bring suit to recover the payment.[15]

3. Poll taxes do not infringe the "equal protection of the laws" clause.

Breedlove v. Suttles, supra, 281 L. Ed. 255.

4. In insisting that the collection of the Tennessee poll tax since 1943 has violated the "due process" clause (because of his contention that the Tennessee Supreme Court was without power to declare contrary to the Tennessee Constitution a legislative act[16] which attempted to repeal the poll tax levy), petitioner seems to be undertaking to overthrow the principal canon of American constitutional jurisprudence and supplant it with the English constitutional theory which died in this country when the opinion in the case of Marbury v. Madison was filed in 1803.[17]

5. The opinion filed by the Tennessee Supreme Court in the case of Biggs v. Beeler,[18] which petitioner attacks as

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14 2 Williams' Code of Tennessee, Sec. 1082; see this brief, p. 15.

15 2 Williams' Code of Tennessee, Secs. 1790-9.

16 Tennessee Public Acts 1943, Chap. 37.

17 1 Cranch. 137, 2 L. ed. 60.

18 180 Tenn. 198, 153 A. L. R. 510; page 21, this brief.

contrary to the United States Constitution, is based upon sound and logical reasoning. The legal proposition propounded is: whenever the legislative branch of the government, in the execution of a trust conferred on it by the constitution has by appropriate legislation executed that trust and put into operation and effect a constitutional mandate (here levied a poll tax); then the supreme court has the authority and duty to declare void any act which by complete repeal attempts affirmatively to nullify the constitutionally commanded law.

This principle of constitutional law has been recognized in Wisconsin. There a statute which made operative a constitutional provision establishing certain property exempt from execution and sale was held not subject to complete repeal. The Court said:

> "There can be no doubt that the Courts possess no power to compel the legislature to enact the laws required by that section (of the constitution); nor could they in the absence of any statutes upon the subject by judicial decision supply the deficiency; but the omission would nevertheless be a clear violation of the plainly expressed will of the people. . . . The failure of the legislature to perform a positive constitutional duty may be a wrong without a remedy **yet when such duty has once been executed the legislature is deprived of all** future power to leave it wholly unexecuted; and that whilst it may, within the constitutional limits, vary or modify the laws by which that duty has been once performed **it cannot totally repeal them without the contemporaneous passage of substitutes.**"
>
> Bull v. Conroe (1860), 13 Wis. 233.

Compare Lieb v. Commonwealth (1840), 9 Watts (Pa.) 200, wherein one legislature had complied with the constitutional mandate to fix the respective terms of office of the associate judges of the state according to a specified for-

mula of rotation and another legislature subsequently undertook to alter the formula. There the Court said:

> "If then the legislature . . . under the amended constitution and in accordance with its provisions, passed an act classifying the associate judges, it seems to us that the power vested in the legislature on the subject was exhausted and could not constitutionally be exercised or interfered with by a succeeding legislature. **It is not an ordinary act of legislation, in which one legislature has no power to bind its successors. It is rather the discharge of a ministerial authority than the exercise of a legislative power.**"

E. It is submitted that there is no merit in petitioner's further contentions of unconstitutionality, namely, (1) that by declaring Tennessee Public Acts, 1943, Chap. 37, unconstitutional because in conflict with the Tennessee Constitution, the Tennessee Supreme Court has so invaded the exclusive province of the Tennessee legislature that the republican form of government guaranteed to Tennessee by United States Constitution, Art. IV, Sec. 4, is abrogated; and (2) that the collection of the 1944 poll tax from the petitioner contravenes U. S. Constitution, Art. I, Sec. 2, wherein provision is made for the election of members of the house of representatives.

The mere statement of these assignments demonstrates their unsoundness. As to the first proposition, the enforcement of the guarantee of a republican form of government is a legislative power committed exclusively to Congress, not the courts, and as such is political and not judicial in character.

Highland Farms Dairy v. Agnew, 300 U. S. 608, 612, 81 L. ed. 835, 840;

Bryant v. Akron Park District, 281 U. S. 74, 79-80, 74 L. ed. 710, 715;

Pac. Tel. & Tel. Co. v. Ore., 223 U. S. 118, 149-151, 56 L. ed. 377, 385-6.

The second proposition was discussed and held unavailing in Pirtle v. Brown, 18 F. (2d) 218, 139 A. L. R. 557, 559, cer. den. 314 U. S. 621, 86 L. ed. 499. In addition as has been argued heretofore at pages 6, 9 of this brief, no question of suffrage is involved in this case.

III. **The United States Constitution provisions cited by petitioner do not prohibit state courts from declaring state statutes invalid because violative of the state constitution—specifically herein, the invalidation of a legislative act which attempts the repeal of a section of the state revenue law.**

A. "The supreme court of a state is the final arbiter on a question of the conflict between a state statute and a state constitution."

16 C. J. S. 205;
Highland Farms Dairy v. Agnew, 300 U. S. 608, 612-13, 81 L. ed. 835-40.

B. Petitioner's argument against this proposition has been previously discussed (supra, pp. 2, 6, 10, 11).

IV. **The Tennessee poll tax is not a tax levied upon voters.**

"They [Tennessee Constitutional and statutory provisions dealing with the poll tax] do not levy a poll tax upon any voter."

Pirtle v. Brown, 118 F. (2d) 218, 139 A. L. R. 557, 560, cer. den. 314 U. S. 621, 86 L. ed. 499.

CONCLUSION.

It is respectfully submitted that for the reasons set out above the Court should refuse to accept jurisdiction of this cause and deny the petition.

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Certification of Service of Brief.

I certify that three copies of this brief have been mailed to Honorable John W. Kilgo, of counsel for petitioner, at his office in Greeneville, Tennessee.

ROBERT T. KENNERLY,

APPENDIX.

1. Opinion of Court Below.

In the Supreme Court of Tennessee.

J. D. Johnson

vs.

Bruce Graham, Trustee, et al.

Opinion filed March 2, 1946

(183 Tenn. ....., 192 S. W. [2d] 832).

Per Curiam.

This is an action to recover two dollars, paid for poll taxes alleged to have been illegally assessed and collected by the trustee of Greene County for public school purposes, one dollar by the state and one by the county. The state tax, which was for the year 1945, was levied under the authority of code section 1082, reading as follows:

> "Every inhabitant between the ages of twenty-one and fifty years, except persons who are deaf, dumb, blind or incapable of labor and of earning a livelihood, shall pay an annual poll tax of one dollar for school purposes, which shall be collected by the trustee of the county and retained in the county where collected and apportioned to the schools of said county in the manner prescribed by law. Liability for poll tax and the exemption therefrom is determined and fixed according to the age of the inhabitant, on the tenth day of January of each year."

The contention of plaintiff Johnson was and is here that this code section had been repealed by Chapter 37 of the Public Acts of 1943.

The defendants state and county maintain that this repealing act had been adjudged invalid and nullified by the decree of this Court in Biggs v. Beeler, 180 Tenn. 198, 173 S. W. 2d 144, 946, 153 A. L. R. 510, leaving the Code section 1082 in force. The trial court so held and dismissed the action. Johnson appealed in error and insists here, as in the circuit court, that the Supreme Court was without authority to nullify the repealing act of the legislature and that its decree is, therefore, void.

While the assignments of error are numerous and the argument takes a wide range, counsel for plaintiff in error, in summing up his position, says that the only question before this Court is whether the lower court was in error in recognizing as controlling and following the decision of this Court in Biggs v. Beeler, supra.

Pretermitting consideration, as did the trial court, of questions raised on the trial by the defense as to good faith in the bringing of the action and as to the tax [not] having been paid under protest so as to entitle plaintiff to sue, we think it clear that the trial court properly recognized the decree of this Court as controlling and as binding upon that inferior state tribunal. It is plain that so long as that holding stands without reversal by this Court, it is the law of the forum and the plaintiff in error is bound thereby.

It is to be borne in mind that it is liability for the payment of this tax under code, Section 1082, which alone is involved. No question of the validity of the requirement elsewhere provided by statute of prepayment of the tax as a qualification for voting was before the trial court, or is properly before us. It appears from the record that no election or occasion for voting was pending, or arose for the year 1945, when this tax was paid. The payment was, therefore, not exacted as a qualification for the exer-

cise of plaintiff's right of franchise and was not made for this purpose of complying with this requirement. Nor was this issue passed upon in Biggs v. Beeler, as is made clear in that opinion in the following language:

> "As has been seen, Chapter 37 deals only with the requirement that a poll tax shall be paid for school purposes. In considering its validity we are not, therefore, concerned with the requirements, sometimes confused with it, of the pre-payment of a poll tax as a condition of voting." At page 202 of 180 Tenn., at page 145 of 173 S. W. 2d.

These issues of (1) liability for the tax and (2) prepayment of the tax as a qualification for voting should not be confused, as they are on the brief of counsel.

The situation here is wholly different from that dealt with by the Circuit Court of Appeals, Sixth Circuit, in Pirtle v. Brown, March, 1941, 118 F. 2d 218, 139 A. L. R. 557, certiorari denied by the U. S. Sup. Ct., 314 U. S. 621, 86 L. Ed. 499, cited by the State, wherein Pirtle challenged the action of the judges in a congressional election in holding him disqualified to vote on the ground that he had not paid his poll tax, and in which case the court sustained the constitutionality of our code, section 2027, whereby prepayment of this tax is made a condition precedent to voting. While the opinion in that case, following Breedlove v. Suttles, 302 U. S. 277, 58 S. Ct. 205, 82 L. Ed. 252, and citing other cases, reaffirms that the making by a state of the payment of a poll tax a prerequisite to voting, does not deny any privilege or immunities protected by the Federal Constitution, thus conclusively disposing of arguments advanced here for plaintiff in error, we are not of opinion, as above indicated, that this issue is now before us. The opinion in Pirtle v. Brown, supra, calls attention to the fact, as "worthy of note," that the Tennessee constitutional provision for levy of the tax

appears in the section dealing with taxation, while that for the payment of the tax as a prerequisite to voting appears in the section dealing with the qualification of voters. And so, in our code, while Section 1082 is codified under the chapter dealing with public revenue, Section 2027 appears under the chapter dealing with elections.

The criticism chiefly stressed of the opinion of this Court in Biggs v. Beeler, supra, appears to be directed to the holding that the pertinent constitutional provision is mandatory, not directory only. Counsel challenges this holding and seeks to reopen this question. It is true, as stated, that this construction was a predicate of our decision. Not only was this view conceded by all counsel and adopted by the Court, without difference of opinion, on the original hearing of that cause, but in response to an urgent petition to rehear, we filed an opinion discussing with particularity and fully this question and clearly demonstrating that this mandatory construction has been given this provision of our Constitution in previous well-considered opinions of this Court. The question is now too well settled to permit a reconsideration.

It results that the judgment of the circuit court dismissing the action is affirmed.

Green, C. J.

Mr. Justice Neil and I agree to the Court's conclusion because the decision in Biggs v. Beeler, 180 Tenn. 198 (from which we still dissent), requires the result reached.

2. **Tennessee Constitutional Provision.**

"Taxable properties, persons, and interests; valuations; tax rates.

"Sec. 28. All property, real, personal or mixed, shall be taxed . . . All male citizens of this State

over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity shall be liable to a poll tax of not less than fifty cents nor more than One Dollar per annum . . ."

Art. II, Sec. 28, Tennessee Constitution (1 Williams' Tennessee Code 262).

3. Historical Resumé of Tennessee Poll Taxes.

Poll taxes have been levied in Tennessee since the earliest years of the State (1796).[19]

"Sec. 2. The public taxes on property and polls shall be in the following proportion . . . on each white poll, twelve and one-half cents; on each slave between twelve and fifty years old, twenty-five cents . . ."

Tennessee Statute Laws (Haywood & Cobbs 1831) 336.

Tennessee poll tax had its origin in the poll taxes existing in North Carolina in 1784 and 1786.[20] Uniformly counties have been authorized to levy a poll tax equal to that levied by the State.[21]

Constitutional requirement for the levy of a poll tax first appeared in the Tennessee Constitution of 1834.

"A tax on white polls shall be laid in such manner and of such an amount as may be prescribed by law."

Tennessee Constitution (1834);
Art. II, Sec. 28, Code of Tennessee, Meigs and Cooper (1858) 39.

The legality of a collection of a poll tax in Tennessee has been consistently upheld throughout its more than one

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19 Tennessee Acts 1815, Chap. 203.

20 Caldwell Constitution of Tennessee (2d ed.) 139. Compare: U. S. Const., Art. I, Sec. 9 (4); Breedlove v. Suttles, 302 U. S. 277, 281, 82 L. ed. 252-5.

21 Tenn. Statute Laws (Haywood & Cobbs, 1831) 355-6.

hundred and fifty years as a part of the revenue structure of Tennessee.[22]

The poll tax collected in Tennessee has been set aside for the support of the public schools of the State at least since 1870.[23] Under the present law all State poll taxes collected in a county are appropriated in the public schools of the county wherein collected.[24]

Capitation taxes have been held valid revenue measures almost without exception throughout the United States.[25]

4. Opinion Biggs v. Beeler.

The Tennessee Supreme Court rests its decision in the present Johnson v. Graham suit upon the precedent of Biggs v. Beeler, 180 Tenn. 198, 153 A. L. R. 510 (1943). For the convenience of the Court the majority opinion in that case is copied herein.

"Mr. Justice Chambliss delivered the opinion of the Court.

"The constitutionality of Chapters 37 and 38, Public Acts of 1943, is challenged on various grounds. Chapter 37 repeals Code Sections 1082, as amended, 1558 and 1559, which levy an annual poll tax of one dollar for school purposes on every inhabitant between the ages of twenty-one and fifty years, with certain exceptions based on incapacity, and provide for collection thereof by the County Trustee.

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22 Kuntz v. Davidson Co., 6 Lea (73 Tenn.) 66; Ballentine v. Pulaski, 15 Lea (83 Tenn.) 633, 646-647; Vertrees v. State Board of Elections, 141 Tenn. 645, 657-660; Greenwood v. Rickman, 145 Tenn. 361, 371-2; Walker v. Cookeville, 6 Tenn. Civ. App. (Higgins) 74, 78; Biggs v. Beeler, 180 Tenn. 198; Pirtle v. Brown, 118 F. (2d) 218, 139 A. L. R. 557 (1941), cer. den. 314 U. S. 621, 86 L. ed. 499.

23 Tenn. Const., Art. XI, Sec. 12, 1 Williams' Code (1934) 335; Tenn. Acts 1870, Ch. 120, Sec. 67; Shannon's Code of Tenn. (1896), Sec. 686.

24 2 Williams' Code of Tenn. (1934), Secs. 1082, 1558.

25 61 C. J. 1534, Secs. 2255 et seq.

"The second Act, Chapter 38, prescribes certain qualifications for voters, provides for state-wide registration of voters and removal of requirements of payment of a poll tax as a prerequisite to voting, and repeals existing laws relating thereto.

"Complainants are taxpayers, owners of real and personal property, only one of whom is shown to be liable for a poll tax, whose burden would be increased by the repeal, by Chapter 37, of Statutes which levy such tax, and by the added expense of administration of the registration regulations enacted by Chapter 38. No question is raised in the pleadings or briefs as to the right of complainants to bring this suit, but it is proper to remark that the Courts take knowledge of the fact that this poll tax is levied on many who own no property and pay no taxes otherwise, and whom its abolishment would operate to exempt from taxation altogether, necessitating an increase of taxes from other sources, including the property of complainants, to meet the deficit thus created. They pray for an injunction restraining execution of the provisions of Chapter 38 and for a declaratory judgment as to the validity of both Acts alleged to contravene certain constitutional mandates set forth in named sections of the constitution of 1870. The defendants are State and County officials charged with the duty of enforcing said Chapter 38.

"We consider first the validity of Chapter 37—first in order of passage, and because, by Section 26 of Chapter 38, it is expressly provided that, 'the operation of this Act shall be suspended at all times said Code Section (1082) is in effect and operation,' etc. In other words, should Chapter 37 be held invalid and the repeal thereby provided for inoperative, Chapter 38 automatically becomes suspended. The operation of this second Act is thus conditioned upon the validity of the first.

"As has been seen, Chapter 37 deals only with the requirement that a poll tax shall be paid for school purposes. In considering its validity we are not, therefore, concerned with the requirement, sometimes confused with it, of the pre-payment of a poll tax as a condition of voting.

"Overruling a demurrer, the Chancellor held that this legislation contravened a positive, mandatory provision of the Constitution. We quote from Section 28 of Article 2 of the Constitution of 1870, the following:

> "'All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents, nor more than one dollar per annum.'"

"Appealing, appellants frankly concede that this provision of the fundamental law is mandatory, as is likewise that part of Section I of Article IV which provides that all males shall pay a poll tax, but say that they are not self-executing, to which proposition their exhaustive brief is mainly directed; that the execution of this mandate is for the Legislature, and that the Courts are without power to enforce its execution by the exercise of control over that body; also, that having the power delegated to it to execute the constitutional mandate, it has the reserved power to reconsider and by repeal undo that which it has done in compliance with this mandate.

"This we conceive to be the determinative question: When the Legislature, in execution of a trust conferred on it by the Constitution, has, by appropriate legislation, executed that trust and put into operation and effect a constitutional mandate, may the Legislature, at a subsequent session, revoke and nullify that which it had done?

"Strangely enough, learned counsel confess failure to find any reported case directly in point; any case in which the Courts of any state have had occasion to consider the power of a Legislature, the creature of the Constitution, to strike down a constitutional mandate which the Legislature, in proper obedience to such mandate, and in exercise of the power vested in it by the Constitution, has put in execution and effect; any case where, after this mandate has been for many years a recognized and enforced part of the body of the law, a repeal has been attempted of such existing law, thereby nullifying the constitutional requirement. Having, therefore, presented to us a case without direct precedent, we turn for guidance to principle and reason.

"This historical comment is pertinent: The Constitution of 1834 called for a tax on polls, reading: 'A tax on white polls shall be laid, in such manner and of such an amount as may be prescribed by law,' Section 28, Article II. The Code of 1858, Sec. 553, fixed the tax at twenty-five cents—an amount equal at the time in purchasing value to the one dollar later fixed. The Constitution of 1870, as has been seen, commanded an annual levy of 'not less than fifty cents nor more than one dollar.'

"At its first session following the adoption of the constitution of 1870 now in force, in express recognition of this mandate of the Constitution, the Legislature fixed the amount at one dollar, the age limitations at twenty-one and fifty years, and provided exemptions based on physical incapacity. They thus grafted the constitutional mandate into the statute, and rendered it operative and enforceable. The Code of 1932 incorporated this law, with amendments extending its application to 'every inhabitant' (subject, as theretofore, to limitations as to age and exemptions) and providing added means of enforcing collection, into the

Code Sections which Chapter 37, Acts of 1943, purports to repeal.

"Thus for more than one hundred years, by constitutional mandate and executing legislative enactment, collection of a poll tax for purposes of public education, conceived by our forefathers to be necessary and just, has been a part of the organic law of this State. Has not the Court the authority and the sworn duty to declare void this Act of 1943 which affirmatively sets aside and nullifies this constitutionally commanded and legislatively approved law?

"In these days, when many men and some Courts treat lightly the constitutional limitations and commands our forefathers thought wise to engraft upon the body of our law, it is well to recall such expressions as the following from the opinion of a former Chief Justice of this Court:

> " 'Constitutions are expressions of the sovereign will of the people, the fountain of all power and authority. The several departments of the government are created and vested with their authority by them, and they must exercise it within the limits and in the manner which they direct. The provisions of these solemn instruments are not advisory, or mere suggestions of what would be fit and proper, but commands which must be obeyed. . . . The supremacy and permanency of republics depend upon the maintenance of the fundamental law, in its integrity, as written in Constitutions adopted by the people; and it is the solemn duty of all those temporarily vested with power, in all departments of the state to do this. The necessities of a particular case will not justify a departure from the organic law. It is by such insidious process and gradual encroachment that constitutional limitations and government by the people are weakened and eventually destroyed.' **State ex rel. v. Burrow**, 119 Tenn. 376, 104 S. W. 526, 527, 14 Ann. Cas. 809.

"(1) It must never be forgotten that the Legislature, like the Court, is subject to the mandates of the Constitution. Mandatory provisions are imperative commands that must be obeyed, and may not be disregarded or repudiated. A wide distinction exists between a mandatory non-self-executing provision of a constitution and one that is directory or permissive only. The Legislature is left free to execute and act on the latter, or not, at its pleasure, and it perhaps has the power to repeal and revoke its execution thereof by such action as it may from time to time elect to take; but a mandatory non-self-executing constitutional provision delegates to the Legislature the execution of a power coupled with a command which, it is true, the Legislature may disregard and the Courts are without authority to enforce performance of by affirmative decree. But, when the constitutional command has been carried into execution, and incorporated into operative law, the Courts, which may not say shall, have the authority and solemn obligation to say shall not. The power of the Courts to declare void and restrain an affirmative act which contravenes and nullifies the higher law is beyond question in this jurisdiction.

"(2) The only answer offered to the view above indicated is the invoking of application of the general rule that a succeeding Legislature may revoke by repeal, that is, 'abrogate or destroy' (2 Bouvier's Law Dict., Rawle's Third Rev., p. 2887), the act of a former. We recognize this to be the general rule, but we here deal with an exception, which we conceive to be sound in principle and compelled by a controlling constitutional mandate. We look through form to substance. In form this Act repeals former acts of the Legislature, but who can deny that in substance, in effect, it renders inoperative a constitutional command, to the extent, at least, of a tax of fifty cents on 'all male citizens of this State over the age of twenty-one

years, except such persons as may be exempted by law on account of age or other infirmity.' Article II, Section 28. To hold otherwise, as well expressed by a member of this Court (in conference touching the instant case), 'would make this constitutional provision meaningless, while appellants freely concede that it is mandatory. It can hardly be conceived that the framers of the Constitution of 1870 would engage in such meaningless labors.' And, as well said by another, 'I certainly do not feel that this Court is precluded from protecting the public revenue and the educational funds of the State, when to do so merely necessitates upholding the Constitution and its clear mandate.' In **Nashville, C. & St. L. Ry. v. Marshall County**, 161 Tenn. 236, at page 239, 30 S. W. (2d) 268, at page 270, this Court said: 'Every new General Assembly is a law unto itself, **within constitutional limitations only.**' We emphasize language most pertinent here.

"Conceding, as we have done for instant purposes, although plausible argument may be made to the contrary, that the instant mandate is not effectively self-executing, and that, as said by Cooley (Constitutional Limitations, 7th Ed., 121), 'Rights in such a case may lie dormant until Statutes shall provide for them,' or, as said elsewhere, 'remain inoperative until rendered effective by supplemental legislation' (17 C. J. S. Constitutional Law, sec. 48, p. 100, citing **Kiernan v. Portland**, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L. R. A. [N. S.] 332, 12 C. J. 720, note 57), or as expressed by this Court in **Friedman v. Mathes**, 55 Tenn. 488, at page 498, they are 'dormant and quiescent until some statute brings them into life and operation.' we have here a case where a constitution[illegible]
originally 'dormant' and [illegible]
breath[illegible]

may be taken only by its creator through constitutional amendment, or convention, not by either the Legislature or the Courts.

"This constitutional mandate has been so 'welded into intimate and permanent union' (Webster) with the statute that the two have become one and indivisible, and the statute may not now be divorced and destroyed. The necessary effect would be to nullify and defeat operation of the constitutional mandate also.

"(3) It is true that, insofar as these Code sections extend the tax beyond 'all **male** citizens,' as provided in the Constitution, this repeal does not violate the express constitutional mandate, but we find no indication of an intention on the part of the Legislature to have this repealing Act apply to women, if the Act is held inoperative as to males. We think it obvious that the legislative intent was to relieve all alike, not a portion only of those liable for this tax. No intention to effect a discrimination between the sexes can be implied. Therefore, being void in an essential part, the repealing act fails all together. Elision may not therefore be applied. **Daniel v. Larsen**, 157 Tenn. 690, at 694, 12 S. W. (2d) 386; **Spring Hill Cemetery v. Lindsey**, 162 Tenn. 420, at 426, 37 S. W. (2d) 111.

"(4) For the reasons indicated, Chapter 37 must be declared invalid, contravening and nullifying as it does, an express mandate of the Constitution, 'For the will of the people, as declared in the Constitution, is the final law, and the will of the Legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body [illegible] with the private citizen.' Quoting and approving [illegible] from Judge Cooley, this Court said in **State v.** [illegible]nn., at page 11, and repeated in **Webb v.** [illegible]82, at page 204, 165 S. W. 426, at page

432, 'These are words of wisdom from the pen of the ablest constitutional Jurist now in our midst, and well deserve to be pondered by those whose duty it is to administer the law, and enforce its mandates, especially in the court of last resort.'

"And, as said by Mr. Justice Cook in **Peay v. Nolan**, 157 Tenn. 222, at page 229, 7 S. W. (2d) 815, at page 816, 60 A. L. R. 408, citing many authorities, 'Every act violative of the intent and meaning of the Constitution is void, and the judicial department, . . . is empowered to so declare.'

"In conclusion, we add this word of reminder: If it be the will of the sovereign people that the time has come to change these or other provisions of the organic law, the way is open, as already suggested, by methods prescribed by that law itself. But such changes, however desirable they may appear to be, must be made in orderly and authorized manner. Until then, neither the Legislature nor the Courts, sworn to observe the Constitution as written, may make or condone such changes.

"As we endeavored to make plain in the outset, this Act, Chapter 37, with which we deal relates only to the poll or capitation tax, as such; neither it, nor what we now decide has to do with the exaction of payment of the tax as a condition of voting. That is dealt with in Chapter 38, which, as before stated, we do not reach, since by the express terms of Section 26 of that Act, its operation is conditioned on the validity of Chapter 37.

"The decree of the Chancellor, insofar as it declares unconstitutional Chapter 37, is affirmed.

"Green, C. J., and Neil, J., dissent.

On Petition to Rehear.

"Mr. Justice Chambliss delivered the opinion of the Court on the petition to rehear.

"A petition to rehear is presented by one of the defendants, H. A. Crox, as a member of the County Election Commission, challenging for the first time, the proposition asserted by complainants below, concurred in by all parties on the hearing in this Court, and adopted in our opinion without dissent, that the provisions in our Constitution for a poll tax is mandatory.

"Frankly conceding that the petition violates our rules of practice and precedent procedure in now raising this issue, learned counsel earnestly argue that an exception should be made, in view of the public interest involved; that the Court is thereby justified in overlooking 'inadvertent' admissions and concessions, made by 'oversight,' and reopening the case for consideration of this question.

"(5) But, if we should disregard our rules and the motion of respondents to dismiss this petition, based thereon and on certain other grounds, and consider the petition, we are not of opinion that there was error in treating this provision as mandatory.

"Petitioner's specific insistence is that too much emphasis has been given the use of the word 'shall' and that the true import of the word 'liable' has been overlooked. Selected definitions of 'liable' and of 'liability' are quoted and relied on to support an argument that the intention was to declare a contingent liability only, for this tax, to become fixed at the will and election of the Legislature; that merely authority to levy such a tax is conferred, without requiring or commanding such a levy. Query: If this is all that was intended, then, since the Legislature has the inherent power to tax (**Vertrees v.**

State Board, 141 Tenn. 645, at page 658, 214 S. W. 737, at page 740), did not the constitutional framers do a wholly useless thing in providing therefor?

"While we found it unnecessary to discuss this question, in view of the general concession and agreement above noted, we were not unmindful of the line of argument now advanced. The definitions and text books, and the decision discussions of these terms, were examined and the conclusion reached that, in its context, the language as a whole clearly indicated an intention to lay down a mandatory poll tax requirement, with nothing left to the Legislature except the enactment of supplementary details of collection and enforcement. But for the delegation of these details the tax provision for the tax would have been fully self executing.

"Petitioner quotes from Webster (and other lexicographers) a definition of 'liable', as follows: 'Exposed to a certain contingency or casualty, more or less probable.' The argument is, therefore, that the use of this word does not signify 'a perfected or fixed legal liability, but rather a condition out of which legal liability may arise.' But, petitioner has passed by the first, or primary, definition given by Webster and quotes and relies on the secondary meaning. The definition reads: 'Liable: 1. Bound or obligated in law or equity; responsible; answerable, etc. 2. Exposed to a certain contingency or casualty,' etc.

"It is as though the Constitution had read, shall be 'bound or obligated in law' to pay a poll tax, etc. According to Bouvier's law dictionary, one who is 'liable' is 'bound in law and justice to do something which may be enforced by action,' citing **McElfresh v. Kirkendall**, 36 Iowa, 224 226; **Wood v. Currey**, 57 Cal. 208, 209; **Joslin v. Car Spring Co.**, 36 N. J. L. 141, 145. This is the defi-

nition adopted by this Court in the opinion in **Choate v. Quinichett,** 59 Tenn. 427, at page 432.

"But this question is not now an open one, not only because of the concessions and conclusions in the instant case, but because this Court has heretofore foreclosed the question in former decisions. For example, in his able opinion in the leading and carefully considered case of **Vertrees v. State Board of Elections**, 141 Tenn., at page 660, 214 S. W., at page 741, Mr. Justice Green, now Chief Justice, referring to this constitutional provision, Art. 2, Section 28, says: 'That instrument **mandatorily declares** that all male citizens shall be liable to a poll tax.' (Emphasis ours.)

"(6) This construction of this provision is in accord with expressions in our earlier cases and is sustained by the general rule that use of the word 'shall' stamps a constitutional provision as mandatory. 11 Am. Jur. 686, 687; 16 C. J. S., Constitutional Law, sec. 61, p. 120.

"(7) A strong presumption supports such construction. Discussing the construction to be given constitutional provisions, this Court said in **State ex rel. v. Burrow,** 119 Tenn. 376, at page 381, 104 S. W. 526, at page 527, 14 Ann. Cas. 809: 'The provisions of these solemn instruments are not advisory, or mere suggestions of what should be fit and proper, but commands which must be obeyed. Presumably they are all mandatory. Certainly no provision will be construed otherwise, unless the intention that it shall be unmistakably and conclusively appears upon its face.'

"(8, 9) A note to the text in C. J. S., above cited, quotes from our case of **Scopes v. State,** 154 Tenn. 105, 289 S. W. 363, 366, 53 A. L. R. 821, the statement that the 'Court is loath to say that any language of the Constitution is

merely directory.' And in that same case Chief Justice Green, elsewhere in his opinion said that, while 'in no case can the court directly compel the Legislature to perform its duty,' i. e., carry out a mandate of the Constitution, 'in a plain case the court can prevent the Legislature from transgressing its duty under the Constitution by declaring ineffective such a legislative act.' This is the principle upon which the majority opinion in the instant case proceeds in declaring the legislative act before it, Chap. 37, Acts of 1943, 'ineffective,' upon the premise we adopted and now reaffirm, that this constitutional provision, Art. 2, Sec. 28, that 'all male citizens of this State over the age of twenty-one years,' with the exceptions stated, 'shall be liable to a poll tax,' etc., is clearly mandatory. To transgress is to violate, or offend against. The majority opinion holds that the attempted repeal of statutes passed in compliance with this constitutional mandate, in order to more fully effectuate it, transgresses, offends against this mandate and is, therefore, violative of it and ineffective.

"While it is true, as said in our opinion, that there is no direct decision authority for holding ineffective an act of the Legislature in the form of a repeal on the ground that it in effect transgresses and nullifies a constitutional mandate, no such question having heretofore arisen, it is equally true that no authority has been produced to the contrary; and we have found no pronouncement of the power of a Legislature to repeal an act of a former Legislature unaccompanied by the proviso that such power is subject to constitutional limitations and restrictions, either express or implied.

"It is not inappropriate just here to refer to a contribution to this subject by that distinguished constitutional lawyer and teacher, Judge Thomas H. Malone, who was for years a leader of the Tennessee Bar and who sat re-

peatedly by appointment on this Court, published shortly before his recent lamented death, in which he reviewed our constitutional poll tax provisions and not only pronounced them plainly 'mandatory' but declared that 'no Legislature, nor series of Legislatures, can "abolish" the poll tax,' that 'to do this a constitutional amendment is required.' This is an extrajudicial opinion entitled to much weight.

"(10) It may be added that, beginning with the leading case of **Marbury v. Madison,** 1 Cranch. 137, 154, 2 L. Ed. 60, in which Chief Justice Marshall sailed an uncharted sea, and, citing no authority, relied alone on principle and reason, our Courts have not hesitated to strike down legislative action, which disregarded, transgressed and defeated, either directly or indirectly, mandates of the organic and fundamental law laid down in the Constitution. This in the performance of their sworn duty, undeterred by clamor or criticism. It was in his opinion in this case that the great Chief Justice first announced the principle of the supremacy of written constitutions over legislative acts, affirming, as expressed by Alexander Hamilton, that 'the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents,' and declaring that there is no escape from the conclusion that 'a law repugnant to the Constitution is void.'

"The petition is dismissed, all concurring in this result.

"Prewitt and Gailor, JJ., concur in the opinion dismissing petition to rehear.

"Green, C. J., and Neil, J., concurred in dismissing the petition to rehear."